BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: JOHN LAING HOMES 3121 Michelson Drive #200 Irvine, CA 92612 Employer	Docket Nos. 04-R3D1-0194 and 0195 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On August 14, 2003, representatives of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by John Laing Homes (Employer) at Potter's Bend and Dorrance Roads, Ladera, California.

On December 10, 2003, the Division issued two citations to Employer. Both citations were issued to Employer as a controlling employer under Title 8, California Code of Regulation 336.10[1] and Labor Code 6400(b)(3). The citations alleged one violation of section 1632(j) [unguarded window openings], classified as General, and one violation of section 1669(a) [no fall protection], classified as Serious. Employer timely appealed both citations.

This matter came on regularly for hearing on October 3, 2006, before an Administrative Law Judge (ALJ) of the Board. Extensive testimony and documentary evidence were received. In lieu of closing arguments, the parties submitted post-hearing briefs, and the matter was deemed submitted thereafter.

The ALJ rendered a decision on December 14, 2006, denying Employer's appeals, and affirming the citations and the proposed penalties issued by the Division. The ALJ so ruled because she concluded that the Employer was a

[1] All references to Title 8, California Code of regulations, unless indicated otherwise.

controlling employer as defined in section 336.10 and Labor Code 6400(b)(3), and that the record established sufficient evidence to support both citations, including the serious classification of Citation 2.

On January 10, 2006, the Board ordered reconsideration of the decision on its own motion, to determine whether the ALJ properly determined that Employer was responsible for the violations as the controlling employer.[2] The Employer's position throughout its various filings is twofold. First, it asserts that the evidence does not support the underlying violations. Second, it repeatedly posits that it is not a controlling employer under section 336.10 or Labor Code 6400(b)(3) because the tort doctrine of Peculiar Risk requires general contractors to affirmatively contribute to the injury causing condition in order to be "liable" for tort damages to the employees of subcontractors. The Division counters that the evidence is sufficient to establish the underlying violations, and that theories of tort liability are irrelevant to regulatory enforcement, since there is no common law tort duty in the regulatory context.

After a review of the entire record, and our prior decisions construing section 336.10 and Labor Code 6400, and published authority from the Court of Appeal construing those portions of the regulatory enforcement scheme, we affirm the decision of the ALJ.

EVIDENCE

The Decision accurately and thoroughly summarizes the lengthy record in this case. In short, the Division inspectors arrived at the Potter's Bend subdivision, under construction by Employer, a general contractor, after receiving an anonymous complaint about a lack of fall protection on a site in the vicinity. Employees of MBC, Inc, the framing contractor hired by Employer to frame residential buildings, were working when the Division inspectors arrived on site. Upon stopping their vehicle, the inspectors observed approximately four framing sub-contractor employees on the second story roof trusses of two homes under construction. Those employees were wearing safety harnesses, but they were not tied off to any lifeline. This condition was visible from the street. Also, the inspectors observed and photographed a worker on the second story, near a framed window, wearing a fall protection harness, who was also not tied to any lifeline.

Employer had two superintendents at the site for at least two hours prior to the Division inspectors observing the violations. One superintendent observed the subcontractor's rope restraint system during an inspection of the framing subcontractor's operation the previous day. This same superintendent was working in his office, a garage located across the street from the violative conditions. Due to the positioning of the houses, with a shared driveway, the

[2] Thereafter, Employer filed a Petition for Reconsideration dated January 12, 2007. The Board issued an additional "Order Taking Petition for Reconsideration Under Submission." The Division filed an "Answer to Order of Reconsideration; Answer to Petition for Reconsideration" on February 14, 2007.

superintendent need only walk outside of his office and part way down the driveway to be able to see what the Division inspectors observed. However, he did not inspect the framing contractor's operation on the day of the Division's inspection.

Several Employer witnesses consistently testified that Employer's policy is to hire experienced sub-contractors on whose expertise the Employer relies to assure compliance with OSHA safety standards. In essence, the Employer admitted it considers itself absolved of responsibility for safety other than housekeeping and "obvious violations." What the Employer considered "obvious violations" was never clarified. These witnesses stated Employer considered itself responsible for "general" safety, however the line between general and specific safety was not established. Finally, both superintendents admitted that if they were aware of an unsafe condition, they would order a subcontractor to stop working and to correct the violation. Their authority to do so was confirmed by the management personnel who testified for Employer.

Corroborating this responsibility over safety and health conditions at the workplace, the contract in effect at the time required the sub-contractors to adhere to Employer's code of safe practices. Failure to do so, or failure to make any safety related correction ordered by the Employer, can result in cancellation of the contract, or a number of lesser consequences, including having to pay the cost of the contractor's abatement thereof. The contract requires the subcontractor to remain responsible for safety within the scope of its own work on the project.

Last, Division inspector Silvia Riley testified as described in the decision regarding the reason she classified Citation 2 [§ 1669(a)] as serious.[3]

ISSUE

Is Employer a controlling employer under section 336.10 and Labor Code 6400(b)(3)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

At a multi-employer worksite, the Division may cite an employer for a violation created by another employer if the cited employer is a controlling employer. (C. *Overaa v. California Occupational Safety and Health Appeals Board* (3rd Dist. 2007) 147 Cal. App. 4th 235; Labor Code § 6400; Cal. Code of

[3] The fall distance was between "20 to 24 feet onto a dirt surface. Based on her experience, the most likely result of a fall would be multi-skeletal injuries, ruptured spleens, punctured lungs and head injuries. Fatalities were possible. It is more likely than not that the injuries would require hospitalization for treatment for over 24 hours." (ALJ Decision, p.4.) Her experience was as an inspector since 1991, during the course of which she investigated 50 to 60 fall accidents, 30 to 40 of which were from heights of 20 to 24 feet. (ALJ Decision, p.2).

Regs. tit. 8, §336.10.) A controlling employer is one who "was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)." (Labor Code § 6400(b), adopting language from section 336.10.)

In construing the multi-employer statute and regulation, we are to give effect to each word if possible and avoid a construction which would render a word surplusage. (*Sully-Miller Contracting Company* v. *California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal. App. 4th 684, 695.) When construing Labor Code section 6400(b), we must be mindful of Labor Code section 6400(c), which states: "It is the intent of the legislature, in adding subdivision (b) to this section, to codify existing regulations with respect to multi-employer worksites. Subdivision (b) is declaratory of existing law and shall not be construed or interpreted as creating a new law or as modifying or changing an existing law."

The regulations referred to are the multi-employer regulations, sections 336.10 and 336.11, promulgated in a 1997 rulemaking by the Department of Industrial Relations (DIR) pursuant to Labor Code section 50.7. That rulemaking was intended to address a Federal Occupational Safety and Health directive addressing a perceived shortcoming in the California State Plan regarding multi-employer worksites. Federal OSHA required the California State Plan to be modified so as to make it "at least as effective as" the federal standards and regulations.

The DIR rulemaking responded to those concerns. The purpose of the rulemaking was stated as: "The proposed regulations will provide for a state citation policy which holds employers responsible for violations in the same manner as the Federal policy." (Final Statement of Reasons, Page 1, 2, OAL file no. 97-1016-015, 12/03/1997, page 2.)

The federal policy was derived from 29 U.S.C § 654(a)(2), and *Grossman Steel*. Therein, the Review Commission held an employer may be responsible for violations even if his own employee was not exposed to the hazard, unless such employer acted with reasonable diligence and yet lacked knowledge of the violation. (1 Employment Safety and Health Guide, ¶ 510 *Multi-Employer Worksites* (C.C.H. 11-6-2000).) The reasonableness of any general contractor's conduct depends on the circumstances of the work. *Desilva Gates Construction*, Cal/OSHA App. 01-2741, 2742 Decision After Reconsideration (Dec. 10, 2004); *Hearn Construction*, Cal/OSHA 02-3536 Decision After Reconsideration (Sep. 19, 2008).)

When the record establishes a lack of reasonable diligence by the general contractor, which has the authority through actual practice or contract to effect a correction of the violation, it is appropriate to find the general contractor is a controlling employer under Labor Code section 6400. (C.

Overaa, supra, 147 Cal. App. 4th p. 250.) Such evidence may also show the employer has failed to carry its burden of proof under Labor Code section 6432.[4] However, the two standards are not co-extensive as they derive from distinct rules.

Employer had, by actual practice, taken responsibility for health and safety conditions at the workplace. Its witnesses unequivocally stated that they could stop the sub-contractor's work at any time if they wanted an unsafe condition corrected. And, one of Employer's two superintendents had inspected the sub-contractor's work; he testified that he inspected the framing subcontractor's work and saw the rigging ropes the day before the Division's inspection.

In addition to this evidence of Employer's actual practice of taking responsibility for health and safety conditions at the workplace, the contract between it and the framing subcontractor authorized Employer to supervise every aspect of the work, including safety. The contract did so through such measures as requiring regular weekly meetings with the subcontractor, requiring English language proficiency for subcontractor employees, retaining Employer's authority to remove foremen employed by subcontractor, and containing the subcontractor's agreement to adhere to Employer's Code of Safe Practices. The contract also provided that Employer retained control of all those who enter the property, prohibiting entry of off-work employees of the sub contractor, family members of employees of subcontractor, or any unapproved work-related site visitor arranged by subcontractor. Although the exact phrase "responsible for health and safety conditions at the worksite" is not contained in the contract, there is no activity not subject to control by Employer under the contract. We infer from this total right to control and supervise all aspects of the subcontractor's work Employer's responsibility under the contract for health and safety conditions at the workplace.

Not only does Employer satisfy the first part of the controlling employer definition, it also had the authority to correct these two particular conditions, thus satisfying the second portion of the rule. Employer's superintendents testified they would order correction of "obvious" hazards. The lack of fall protection violations occurring here were visible from the street, and were obvious by anyone's measure. (*Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279, Decision After Reconsideration (Aug. 20, 2001) [Violations in plain view are conditions that an employer should discover with the exercise of reasonable diligence].) Therefore, the Division made a prima facie case establishing Employer as the controlling employer.[5] The Division also provided sufficient

[4] The *Overaa* Court declined to decide if an employer could rebut a prima facie case of a controlling employer violation by showing it exercised due diligence and yet was unaware of the existence of the violation, since that issue was not properly raised by the employer earlier in the proceedings.

[5] We note the Employer's failure to inspect this day, given the hazards visibility from the street, would also defeat any claim under the Federal scheme that employer acted reasonably and still was unaware of the violation. (*Marshall v. Knutson Construction Company* (8th Cir. 1977) 566 F. 2d 596.)

evidence of the substantial probability of serious physical harm assuming an accident resulted from the violative condition, and so the Division met its burden of proof regarding the serious classification. Lastly, the record does not support a conclusion that the Employer acted reasonably, under the circumstances, in failing to inspect at all on the morning of the Division's visit. Even under the federal rule on which the regulation was modeled, the violation has been established.

The evidence shows Employer's policy was to attempt to fulfill its own safety duties by placing them in the hands of the subcontractor. An employer's safety obligations are not delegable because the effect of such delegation would allow private contracts to subvert the regulatory purpose of the Act. (*Kimes Morris Construction Inc.*, Cal/OSHA App. 02-1273 Decision After Reconsideration (Aug. 8, 2008) [An employer's duty to provide its employees a safe and healthy work place is non-delegable.]; see, e.g., *Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

The wisdom of this prohibition is demonstrated by this case. Here, the general contractor tried to delegate its duty to an "expert," the framer, which itself used improper rigging, and allowed its employees to work at heights of 20 to 24 feet above ground without being tied off. The general contractor, which is in the business of constructing two-story residences, remained deliberately ignorant of the actual standards for fall protection in reliance on this "expert." And, although it controlled every aspect of the work being done, and actually inspected the subcontractor's work the day before, it failed to address these violations, which were both in plain sight, and within a few steps proximity to its superintendent's workplace. With minimal effort, these violative conditions would have been abated by Employer. From this record, the most reasonable inference to draw is that the supervision provided by Employer over its subcontractors was insufficient. The policy of increasing workplace safety through the multi-employer workplace regulation and statute is furthered by requiring Employer, who took responsibility for all aspects of the work being done, and who actually inspected at times, to make reasonable inspections to identify obvious, plain view hazards.

Like any employer contesting a serious violation, a controlling employer can avail itself of Labor Code section 6432. That section provides a defense to the serious classification of any citation if the employer did not know of the violative condition, and with the exercise of reasonable diligence, could not have known of the violative condition. The Board has considered the evidentiary showing that is required to establish the defense on many prior occasions. (See *Roof Structures, Inc.*, Cal/OSHA App. 91-316, Decision After Reconsideration (Oct. 29, 1992); *Bickerton Iron Works, Inc.*, Cal/OSHA App. 01-4978, Decision After Reconsideration (Feb. 25, 2004); *Irby Construction* Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007).)

When the violation is visible to observers from a public street, an employer's failure to observe it will normally preclude a finding that an employer acted reasonably to identify hazards. (*XL Construction*, Cal/OSHA App. 08-1191, Denial of Petition for Reconsideration (Aug. 11, 2009); *Davis Brothers Framing*, Cal/OSHA App. 03-0114 Decision After Reconsideration (Jun. 10, 2010); *Rex Moore Electrical Contractors And Engineers,* Cal/OSHA App. 07-4314 Denial of Petition for Reconsideration (Nov. 4 2009). We have held that violative conditions which are in plain view are conditions that an employer should discover with the exercise of reasonable diligence. (*Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279, Decision After Reconsideration (Aug 20, 2001)*; Fibreboard Box & Millwork Corp.*, Cal/OSHA 90-492, Decision After Reconsideration (June 21, 1991).)[6] Thus, Employer has failed to show it acted reasonably in failing to identify the hazard. As such, it has not met its burden of proof under 6432, and so the serious classification is established.

For sake of completeness, we address Employer's other arguments. Employer contends the Board must follow civil tort law in determining the validity of the regulatory violations here. While the Legislature has empowered the Department of Industrial relations, through the Division, to enforce employment safety standards, through inspections, abatement orders, and penalties (Labor Code §§ 6300, 6307), these standards are not based on theories of tort liability.

In *Kizer* v. *County of San Mateo* (1991) 53 Cal.3d 139, 146, the Supreme Court considered the potential overlap between regulatory enforcement schemes and recovery by plaintiffs for civil damages, and concluded the two are separate actions that serve different social purposes and so the tort principles did not apply to the regulatory scheme. "Like the Court of Appeal, we find nothing in the Tort Claims Act to suggest that [it] was intended to apply to statutory civil penalties designed to ensure compliance with a detailed regulatory scheme, such as the penalties at issue in the present case, even though they may have a punitive effect. The Department's citation enforcement action lies outside the perimeters of a tort action and therefore does not readily lend itself to a liability analysis based on tort principles." (*Id.*)

Although Employer repeatedly argues the *Privette* doctrine limits its "liability," all of those cases define the scope of the common law tort duty a general contractor owes to injured employees of subcontractors. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.) The Employer faces no tort liability in the administrative proceeding before the Appeals Board. Thus, any authority defining duty is irrelevant, as would be any cases defining tort damages, proximate cause, or other element of a civil tort action. (*Kizer*, *supra*).

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[6] In theory an obvious violation can be created shortly after a controlling employer conducted an inspection, or otherwise occur in a manner which itself would preclude discovery in the exercise of reasonable diligence. No such circumstance is found to exist here, however; to the contrary, Employer's superintendent had been in his office for two hours prior to the Division's arrival on the scene.

The other arguments raised by Employer justifying its failure to take any steps to address the safety violation created by its subcontractor have been considered and rejected by the Board in previous decisions. (*Desilva Gates Construction*, Cal/OSHA App. 01-2741, 2742 Decision After Reconsideration (Dec. 10, 2004).[7])

DECISION AFTER RECONSIDERATION

Since Employer failed to establish the affirmative defense of lack of employer knowledge, per Labor Code section 6432, the serious classification of Citation 2 is affirmed. Since the record supports the conclusion that Employer was not reasonably diligent in attempting to detect either violation, both of which were visible from the street, the citations of Employer as a controlling employer are appropriate. The citations and the penalties imposed in the Decision are affirmed.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Board Member

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[7] "Employer also cannot insulate itself from liability for safety order violations for which it is responsible as the controlling employer by attempting to shift responsibility to its subcontractor by claiming it had no expertise in the field of work for which it hired the subcontractor. It is a long-standing principle of the Board that safety responsibility may not be shifted by virtue of agreements between employers, [FN 17 M*oran Constructors Co.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975)] or because the employer does not employ the employees, [FN18 *Zapata Diversified Builders*, Cal/OSHA App. 80-1059, Decision After Reconsideration (Jun. 29, 1981).] or because the subcontractor removed guardrails the day after they were properly installed by the employer; [FN19 *Novo-Rados Constructors*, Cal/OSHA App. 78-135, Decision After Reconsideration (Apr. 28, 1983).] nor may an employer rely on third parties to fulfill its responsibility to provide for the safety of employees, [FN20 *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).] and an employer cannot be exempted from safety standards based on ignorance or *lack of expertise*. [FN21 *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).]"